

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

L.C. ELDRIDGE SALES, ET AL : DOCKET NO. 6:11CV599  
:  
VS. : TYLER, TEXAS  
:  
AZEN MANUFACTURING, ET AL : NOVEMBER 7, 2013  
:  
10:00 A.M.

FINAL PRETRIAL CONFERENCE  
BEFORE THE HONORABLE MICHAEL H. SCHNEIDER,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: MR. ERIC HUGH FINDLAY  
MR. WALTER WAYNE LACKEY, JR.  
FINLAY CRAFT  
6760 OLD JACKSONVILLE  
SUITE 101  
TYLER, TX 75703  
  
MR. ERIC P. CHENOWETH  
YETTER COLEMAN  
909 FANNIN, SUITE 3600  
HOUSTON, TX 77010  
  
FOR THE DEFENDANTS: MR. HARRY LEE GILLAM, JR.  
GILLAM & SMITH  
303 S. WASHINGTON  
MARSHALL, TX 75670  
  
MR. DAVID A. ALLGEYER  
MR. CHRISTOPHER RYAN SULLIVAN  
MS. CARRIE RYAN GALLIA  
LINDQUIST & VENNUM  
4200 IDS CENTER  
80 S. EIGHTH STREET  
MINNEAPOLIS, MN 55402

COURT REPORTER:

MS. JAN MASON  
OFFICIAL REPORTER  
221 W. FERGUSON #100  
TYLER, TEXAS 75702

PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY, TRANSCRIPT  
PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

1 THE COURT: Good morning to everyone.

2 MR. FINDLAY: Good morning, Your Honor.

3 MR. GILLAM: Good morning, Your Honor.

4 MR. ALLGEYER: Good morning, Your Honor.

5 MR. CHENOWETH: Good morning, Your Honor.

6 THE COURT: Boy, that was lively. Appreciate that.  
7 Gets my day going here. Thank you.

8 We're here in Case Number 6:11CV599. The case is  
9 styled L.C. Eldridge Sales Company, et al versus Jurong  
10 Shipyard, et al. We are here on a final pretrial  
11 conference. The jury selection takes place next week.

12 Actually, we would be ready to pick the jury today if  
13 our case -- since our case settled that was right before it,  
14 but -- does anybody want to choose a jury today? Okay. All  
15 right. I assume by -- I assume by those people that are  
16 lying on the floor that it answered the question.

17 Okay. We'll keep that -- I believe it was on the 15th,  
18 if I'm not mistaken, as the day that we'll be picking the  
19 jury in the case. But now we need to get ready for that and  
20 make sure that we've done everything that we can do that  
21 will make the trial go smoothly so the parties can focus on  
22 the presentation of their case and impressing the jury with  
23 that presentation, and so that things kind of go  
24 automatically so they won't have to be spending their nights  
25 wondering what the Court is going to rule on a particular

1 issue or some issue that they are not sure about. So we're  
2 going to try to do -- or we are going to resolve as many  
3 things as possible here today.

4 So let's get started and let me make sure that I know  
5 everybody that's here. We'll begin with the -- with the  
6 Plaintiffs in the case, if you'll make an announcement, and  
7 then we'll move over to the Defendant. And I would like for  
8 everybody at the table to -- I would like to know who's at  
9 the table, whether or not you're introduced by the person  
10 who represents the parties or just if you want to say hello  
11 yourself. So with that bit of a wind-up, let's start off  
12 with the Plaintiffs.

13 MR. FINDLAY: Good morning, Your Honor. Thank you.  
14 Eric Findlay on behalf of the Plaintiffs, and also with me is  
15 Eric Chenoweth from Yetter and Coleman down in Houston and  
16 Walter Lackey, and we're ready to proceed, Your Honor.

17 MR. LACKEY: Good morning, Your Honor.

18 THE COURT: Good morning. Nice to see everybody.  
19 All right. We'll move over to the Defendants, please.

20 MR. GILLAM: Good morning, Your Honor. Gil Gillam on  
21 behalf of the Defendants. Your Honor, with me today, from the  
22 front of the table, is David Allgeyer.

23 MR. ALLGEYER: Good morning, Your Honor.

24 THE COURT: Good morning, sir.

25 MR. GILLAM: Chris Sullivan and Carrie Gallia.

1 MS. GALLIA: Good morning, Your Honor.

2 THE COURT: All right.

3 MR. GILLAM: We're ready to proceed, Your Honor.

4 THE COURT: All right. Thank you. And nice to see  
5 everybody on your side.

6 Okay. Well, in getting started here, the first thing  
7 that I would like to touch base with you on is I denied a  
8 motion to dismiss regarding Atlantic -- pardon me, Atwood  
9 Oceanic Global, LTD, GATL, however you wish to refer to  
10 that. What are your plans for filing an answer in the case?

11 MR. GILLAM: Gil Gillam again, Your Honor. We will  
12 be filing an answer today on behalf of that Defendant.

13 THE COURT: All right, sir. What do you expect to --  
14 the nature of it to be? Is it going to be different than --  
15 are you bringing any new issues to the table?

16 MR. GILLAM: There will be nothing in that answer,  
17 Your Honor -- correct me if I'm wrong -- that is any different  
18 than any other answer that has been filed by any other  
19 Defendant. No new issues will be raised.

20 THE COURT: Okay. Well, I say that because there's  
21 no need for us to go forward with this if we're going to have  
22 something new in it. I mean, we can just stop and I can wait  
23 for you to file your answer.

24 MR. GILLAM: No, there will be nothing new in there,  
25 Your Honor. We can proceed.

1 THE COURT: All right. I'm not being rude about it.  
2 I mean, it just -- it wouldn't do us any good to have this  
3 meeting here today if we didn't do that.

4 Make sure -- I see some people discussing it over  
5 there. Make sure that is your final position.

6 MR. GILLAM: We're good with that, Your Honor.

7 THE COURT: All right. Thank you.

8 Well, I'll congratulate you on your progress. I like  
9 to see -- on working out a lot of the matters. In an ideal  
10 world, and not only in an ideal world, in my world most of  
11 the times these things are already solved before we get  
12 here, but I congratulate especially the local attorneys for  
13 working hard to make sure that you have met a lot of my  
14 expectations for you to be ready to go to trial.

15 So let me give you just a few rulings before we get  
16 started here and maybe that will help us in -- in our  
17 journey here.

18 Let's go to some of the summary judgments and let me  
19 just tell you what -- from all your documents that you  
20 filed, all the evidence you filed, I'm convinced that the  
21 Outer Continental Shelf Lands Act applies in this case, not  
22 only applies -- no one denies that it applies, but it also  
23 extends the federal laws to the devices in this case, that  
24 they are temporarily attached to the seabed under the law,  
25 as per the law. And I do find that to be a legal issue,

1 unless you can raise something that I haven't seen that  
2 would make me believe it was a factual issue. But from  
3 everything I can see, that is a legal issue.

4 The statute is pretty clear about the purpose -- one of  
5 the main purposes was to make sure that they defined certain  
6 limitations and duties and who was responsible under federal  
7 law in developing the natural resources in that area.

8 So, in fact, I find really that you all -- there is  
9 really no dispute in your papers that the accused rigs  
10 operate in that area. The question, it looked like to me,  
11 was the attachment, whether or not you were attached. And  
12 the Plaintiffs have established through the deposition  
13 testimony of Grant Howard and Bobby Warren that the semi-  
14 submersible drilling rigs were attached to the outer  
15 Continental Shelf to develop natural resources. Thus, the  
16 Court would conclude that there is no fact issue remaining  
17 in that area.

18 Further, on the issue of the construction of the word  
19 "housing", I notice that's raised not only here but in your  
20 motions in limine and I'll try to give you a little help on  
21 what my -- what direction I'm going on that.

22 The Court -- I've considered that, and as I said in the  
23 construction, "housing" means a case or enclosure. It does  
24 not mean anything that defines a mechanical -- there's not  
25 any type of mechanical requirement or anything of a

1 mechanical nature that needs to be involved in that  
2 enclosure.

3 I will not allow any expert testimony to give a  
4 contrary definition, and that means that the Defendants'  
5 expert cannot testify that a housing must enclose or encase  
6 something that is mechanical, that that is a requirement.

7 Further, I find that the Plaintiffs' expert identified  
8 the housing on the accused exhaust system.

9 As to Jurong's motion for summary judgment, I find that  
10 Jurong's corporate representative, when he testified that  
11 Jurong knows where the rigs it builds will go after  
12 completion and that Jurong stated in its -- has stated in  
13 its publications, the Dolphin Magazine, that the accused  
14 rigs would go to the Gulf of Mexico after completion.  
15 Accordingly, I would deny the motion for summary judgment in  
16 that regard.

17 As to the issue on anticipation and obviousness, the  
18 Defendants have moved for summary judgment on the grounds  
19 that the Copen reference was disclosed, discloses the  
20 injection of ambient air into the exhaust system. I find  
21 that the arguments raised in the motion are -- after  
22 reviewing those, I deny that motion for summary judgment.

23 As to the lack of a written description, the Court  
24 finds that the Defendants did not timely raise this  
25 invalidity theory, nor did they seek leave of the Court to



1 add this additional invalidity theory, so I'm going to deny  
2 summary judgment and also will rule that the Defendants may  
3 not argue that lack of a written description to the jury  
4 issue before the jury because they've waived that argument.

5 On motions to exclude experts, Defendants' motion to  
6 exclude Joseph Davis's opinion regarding the long-felt need  
7 in the industry -- an expert obviously can rely on hearsay.  
8 It's the type of evidence typically used by an expert in the  
9 field, and I do find that customer and industry input rises  
10 to the level of the type of information an expert in the  
11 field would rely on. The Defendants' challenge is more  
12 appropriately directed to the weight of Davis's testimony.

13 Accordingly, the Court has -- the Defendants have not  
14 demonstrated his opinion is unreliable and that motion is  
15 denied.

16 Further, Defendants' motion to exclude the opinion of  
17 Plaintiffs' expert witness on damages, there are several  
18 pieces to that, several parts to it. That would be Todd --  
19 I'm going to go with Schoettelkotte. I'll do that as best as  
20 a third descendent of German descent -- Schoettelkotte looks  
21 about right to me. I don't know whether my relatives would  
22 agree with that pronunciation.

23 But the -- to just put it in sum, Defendants' motions  
24 are denied. Let me go into it. Plaintiffs have  
25 demonstrated their damages expert considered market

1 conditions, specifically the role of supply and demand. For  
2 example, Mr. Schoettelkoette or Mr. Schoettelkoette  
3 considered the following facts: That there were two  
4 suppliers, Plaintiff and Azen, which offered the accused  
5 products. Second, the Plaintiffs have had continued success  
6 selling their products at the higher price. Third, the  
7 accused products were considered a necessary element of the  
8 rigs. And fourth, there was not a non-infringing  
9 alternative.

10 Accordingly, Mr. Schoettelkoette's opinions are found  
11 in valid -- founded in valid economic principles, and thus,  
12 they are admissible. Defendants' concerns go to the weight  
13 and not the admissibility of the evidence.

14 Now, as to the challenge to Mr. Schoettelkoette's  
15 damages calculations as improperly based on the entire  
16 market value of the Plaintiff's engine exhaust system, which  
17 of course includes the patented ENJET component, the  
18 Plaintiffs' damage calculation is based on the value of  
19 the -- on the value of the engine exhaust system. The  
20 expert explains that the patented invention is the driving  
21 force of the system. The remaining parts, such as the fans,  
22 electrical wirings and so forth, are merely the vehicle to  
23 bring to life the patented invention and would not  
24 independently be considered saleable units.

25 Accordingly, Mr. Schoettelkoette's opinion does not

1 violate the entire market value rule and would be  
2 admissible, at least when it comes to that objection.

3 The Plaintiffs' motion to strike a late filed motion in  
4 limine. Plaintiff filed a motion in limine. The Court's  
5 Scheduling Order placed a deadline to file on October 11,  
6 2013, and so I'm going to strike that motion in limine as  
7 untimely.

8 The parties are reminded not to file any further  
9 motions without first obtaining leave of the Court.

10 Now, going on to some other matters on the Plaintiffs'  
11 motions in limine, I understand that you've had some -- I've  
12 got some rulings on those. If you've reached agreement on  
13 them, I don't want to disturb those, and I'm not sure to  
14 what extent you need a ruling in order to assist you in  
15 reaching agreement on your final -- on the remaining  
16 documents.

17 I can rule, for instance, on one motion here that --  
18 regarding the inventorship of the '828 patent about the part  
19 Gary Leseman played, the Plaintiffs move to exclude that  
20 argument. I'm going to grant that.

21 And then the other is regarding interpretation of the  
22 claim terms that contradict the Court's construction order,  
23 I'm going to go ahead -- and you may have reached some  
24 agreements on it, but I need to make sure that we're clear  
25 on this. About the housing, I ruled on the housing. I

1 mentioned where the Defendants' motion for summary judgment  
2 argued that none of their products have housing and relied  
3 on certain arguments, the Defendants are to be precluded  
4 from arguing any other definition than what was specifically  
5 said.

6 Defendants argue that they're not arguing a different  
7 definition, just a different context. Well, I've already  
8 told you what my feeling about the housing is. It does not  
9 require any type of mechanical device, and frankly, in my  
10 opinion, the housing -- the invention only requires or is  
11 consistent with what the Plaintiffs' argument is on that.

12 Now, the other issue --

13 MR. ALLGEYER: Excuse me, Your Honor. I'm not sure  
14 if I'm allowed to interrupt.

15 THE COURT: No, you're not really.

16 MR. ALLGEYER: I'm sorry, Your Honor.

17 THE COURT: But what is it you want to say? We're  
18 not going any other place with the housing is what I'm saying.

19 MR. GILLAM: That's what it's about.

20 THE COURT: We're just not going any other place with  
21 it. I mean, you've inserted a requirement or a limitation that  
22 they have to have something mechanical inserted or it's this as  
23 it existed on the -- I have to go back and look at the names of  
24 the parties. Was it the ENJET unit did not have a housing?

25 MR. ALLGEYER: Azen, Your Honor.

1           THE COURT: Was that it? Well, I would tell you that  
2 it does. I mean, that would be my -- that would be my opinion  
3 on it, and we'll -- we'll talk about whether or not there's a  
4 fact issue, whether or not you can possibly come up with a fact  
5 issue on that. In my opinion, I don't think you can, and  
6 that's one reason why I'm giving you the benefit of these  
7 rulings here is to tell you -- frankly, if you want me to just  
8 sum it up, I don't -- I mean, I think they're pretty doggone  
9 close to summary judgment on infringement. And when you couple  
10 that with the idea that -- of what you're relying on for prior  
11 art, you know, you're not -- a lot of that was disclosed late  
12 and I'm not going to permit that.

13           I don't mean to sound rude to you. These are just my  
14 rulings on it.

15           So, anyway, if you want to sit down and talk about what  
16 else is left to be admitted, we can do that. I'll take a  
17 break now and then you can talk about it and maybe come up  
18 with some questions you would like to ask, okay?

19           MR. ALLGEYER: Thank you, Your Honor.

20           THE COURT: All right. Thank you.

21                     (Court steps down from the bench.)

22           THE COURT: I guess what I'm recommending is, I would  
23 highly recommend that you settle the case. I'm not just making  
24 those rulings and picking on people. I'm just saying I don't  
25 see much to go forward on, but that's just me.

1 (Recess.

2 THE COURT: All right. I appreciate the progress  
3 everybody has been making. Let me get back and finish on the  
4 motions in limine.

5 The Plaintiffs' motion in limine regarding the  
6 Stempovski opinion letter, that was the opinion letter, and  
7 I believe there was some question about whether or not  
8 someone could introduce that into evidence. I'm going to  
9 grant the motion in limine.

10 Of course, you know, the motion in limine means that  
11 basically that if you think -- it's not a final ruling. You  
12 just, when those items come up, you -- if you feel that it's  
13 worth talking about at the time, we'll -- I'll see if you've  
14 laid your predicate or if it has become admissible.

15 So there are ways I could see that that opinion letter  
16 could become admissible, but as it stands now just on its  
17 face, it's not.

18 The motion in limine regarding the re-examination of  
19 the patents, unless I am missing something that makes it  
20 totally inadmissible, I would say at least some -- some  
21 mention of that can be made.

22 Can you work out any type of agreement about how much  
23 you want to get in and so forth?

24 MR. FINDLAY: Eric Findlay on behalf of the  
25 Plaintiff, Your Honor. We can certainly try to come to some

1 understanding on that.

2 THE COURT: Well, I know you would try, but I mean,  
3 basically you can't rely on somebody else's opinion that's not  
4 your attorney, unless of course there is some kind of evidence  
5 that I don't know that you've relied on.

6 So I'm going to go ahead and grant the motion in limine  
7 and you can then work and see if it becomes admissible,  
8 okay?

9 Then the Exhibit 228 would be the Momose patent.  
10 Again, I'm sustaining the objection to that. It was late  
11 filed and so I'm not going to allow that.

12 What else? Now, let me just make a clarification on a  
13 ruling that I made. What I said about the "housing" still  
14 stands, that is that, as you know, the actual interpretation  
15 or meaning given to "housing" was that it was a case or  
16 enclosure, and there is no -- as I said earlier, there is no  
17 specific requirement that it encase or enclose any specific  
18 thing, including a mechanical device. So there will not be  
19 any argument that that is the case, that it has that  
20 requirement.

21 However, there is at least a fact issue regarding  
22 whether the wye duct itself satisfies the Court's definition  
23 of "housing" and, for example, it could be that the  
24 parties -- you might -- I could see a scenario where you  
25 might present testimony that the wye duct in the -- is the

1 intersection of two pipes rather than a case or enclosure,  
2 and there is some room for that argument. But that does not  
3 say that the housing requires a case or enclosure.

4 Does that make it clear?

5 MR. GILLAM: Yes, Your Honor. I -- well, yes, I  
6 believe it does, Your Honor. Mr. Allgeyer can talk about it.  
7 I think that was our concern was that --

8 THE COURT: I understand, and when I walked away I  
9 thought about that a bit and it seemed -- and I went back and  
10 read -- re-read or picked up the file again on that hearing,  
11 and I think that -- I mean, there can be a fact issue on that.

12 MR. GILLAM: I think our point, Your Honor, was  
13 that -- I mean, our position is there's no housing and we have  
14 to be able to tell the jury we don't believe there's a housing  
15 because, and we could not say and would not say because this  
16 does not -- this contains some mechanical device. We would not  
17 go there at all.

18 THE COURT: Right.

19 MR. GILLAM: I think our position would be it's not a  
20 housing because of -- if the Court's definition is an  
21 enclosure, it's not enclosing anything. It's not a mechanical  
22 device but it doesn't enclose anything. So that would be our  
23 argument. Otherwise, there's no argument there, so --

24 THE COURT: All right. That's -- and that is the  
25 correct understanding.



1 MR. GILLAM: Thank you. That's correct, Your Honor.

2 THE COURT: All right. I'm not going to ask you if  
3 everybody is happy, but is everybody satisfied that you  
4 understand what I mean? Yes?

5 MR. FINDLAY: The one issue, Your Honor, I think you  
6 had asked about and I'm not sure if we gave you the answer. I  
7 think you had indicated that the re-exam, some portion of that  
8 at least was fair to come in, fair game. And I think you had  
9 asked if we could agree on how much of that might come in or  
10 not.

11 And I assume you're willing to talk about that.

12 I think we can try to talk about that and see if we can  
13 come up with a solution that Your Honor would think is fair  
14 and appropriate.

15 THE COURT: All right, sir.

16 MR. ALLGEYER: We're happy to talk about that. I  
17 guess I didn't -- maybe I got my notes wrong. Was the motion  
18 in limine on the re-exam granted or not? I just --

19 THE COURT: On what?

20 MR. ALLGEYER: I'm sorry, Your Honor. The motion on  
21 the re-exam, did you grant the motion in limine on that or  
22 deny?

23 THE COURT: No, no, I did not. I'm going to permit  
24 it.

25 MR. ALLGEYER: Oh, okay.

1 THE COURT: I may have said that some way -- you  
2 know, when you talk about a motion in limine, you kind of talk  
3 in doubles. I mean not you.

4 MR. ALLGEYER: I absolutely know that, Your Honor.

5 THE COURT: And, you know, it's kind of like -- well,  
6 I don't need to say anything further.

7 MR. ALLGEYER: It's probably my notes.

8 THE COURT: For a judge, when you get up and you say  
9 I grant the motion in limine, well, that means that you can't  
10 bring something in until that time.

11 And while we're at that, I want to say about the  
12 motions in limine, please be reminded that to -- these are  
13 rulings as far as the way we conduct the trial and what  
14 would be -- I mean, I'm not in any way saying anybody would  
15 be guilty of contempt, but I'm saying if we did not -- if  
16 you just got into these things, it would be, of course, a  
17 violation of the Court's rulings. You still have to have  
18 your rulings on issues, unless we have something we reach on  
19 the side and say you definitely -- this has been determined  
20 so there's no question on it or it can't ever come in.

21 But anyway, does everybody have an understanding about  
22 the motions in limine, the effect of it?

23 MR. ALLGEYER: I think so, Your Honor.

24 THE COURT: It's not a definitive ruling or an end  
25 ruling on anything, okay?

1 MR. ALLGEYER: So it's possible, for example, our  
2 opponents could put in evidence that opens the door to some of  
3 this, if possible, and we would be able to refute that? But we  
4 would want to take that up with Your Honor first before we --

5 THE COURT: Yes, that's a good example.

6 MR. ALLGEYER: All right. Thank you, Your Honor.

7 THE COURT: Thank you. Now tell me about the weather  
8 where you're from this time of year. I'm joking with you.  
9 We can talk about that in a minute.

10 MR. ALLGEYER: We did have some snow, Your Honor.  
11 We're glad to be here.

12 THE COURT: Really?

13 MR. ALLGEYER: Yeah.

14 MR. GILLAM: One -- one issue, Your Honor. We  
15 understand the Court has ruled out the Stempkovski letter. We  
16 understand. The question is whether or not Stempkovski can  
17 testify.

18 THE COURT: Well, whatever is left of his testimony,  
19 yes.

20 MR. GILLAM: Thank you, Your Honor.

21 THE COURT: I'm not that familiar with what's left of  
22 his testimony.

23 MR. GILLAM: I'm going to have to get familiar with  
24 that too, Your Honor.

25 THE COURT: It was specific as to --

1 MR. GILLAM: His opinion letter.

2 THE COURT: That particular document, I think, wasn't  
3 it, if I recall? It's been a couple of days since I looked at  
4 that. That was his opinion.

5 MR. SULLIVAN: Chris Sullivan. There are two opinion  
6 letters. The Plaintiffs have also objected to him appearing at  
7 all as a witness.

8 When you were discussing your ruling on the motion in  
9 limine, you seemed to open -- leave open the issue of  
10 whether or not foundation could be laid for introducing that  
11 opinion.

12 THE COURT: That's correct.

13 MR. SULLIVAN: At some point through that. So they  
14 have -- they have an objection about him appearing as a  
15 witness, and I guess we're just looking for clarity as to  
16 whether or not we can bring him down to serve -- to do that,  
17 lay that foundation.

18 THE COURT: Well, whether or not you bring him as a  
19 witness, I mean, you have to qualify him, meet all the other  
20 qualifications, such as disclosure and things like that, and  
21 list him as a witness. If you've done that --

22 MR. SULLIVAN: We have done that.

23 THE COURT: I don't know. We'll have to get to that  
24 issue when it comes. Give me an example of what you want so I  
25 can understand and make it clear for you, if I can.

1 MR. SULLIVAN: Well, as I say, the Plaintiffs have an  
2 objection, a standing objection before the Court on whether or  
3 not Mr. Stempkovski should appear as a witness. He was listed  
4 on the Defendants' witness list.

5 MR. FINDLAY: May I be heard?

6 THE COURT: Let me give you my reason for the ruling.  
7 It was not his -- he was not shown to be the counsel of that --  
8 is this the same one about his opinion?

9 MR. FINDLAY: Correct.

10 THE COURT: As a defense to willfulness or whatever  
11 or intent? Is that the one?

12 MR. FINDLAY: That's correct, Your Honor.

13 THE COURT: Yeah. And the way it was presented to me  
14 was that if that is presented as evidence to -- that they  
15 relied on that opinion in order to disprove or to negate intent  
16 or whatever, he's not -- he hasn't been shown to be their  
17 attorney. That was the grounds. In other words, they stated  
18 the grounds. On those grounds, I sustain for those reasons  
19 that they stated, okay?

20 MR. FINDLAY: And my --

21 THE COURT: What's your question?

22 MR. FINDLAY: I was just going to clarify the  
23 Plaintiffs' position. I think you've stated it, which is  
24 correct with our understanding, Your Honor. The reason we had  
25 asked for his letter to be stricken and also for him not to be

1 allowed to testify is because it was our understanding that the  
2 only basis, the only thing he was going to testify about was  
3 this purported opinion of counsel, which was given to none of  
4 the Defendants here and which I think the Defendants agree with  
5 us that all of their corporate representatives have admitted in  
6 deposition testimony that they didn't rely upon. That was why  
7 we asked for him to be stricken.

8 THE COURT: Well, it sounds like he has a tough time  
9 getting it in then. But I can't give you advice in total on  
10 every case. I just want to make it clear that I was ruling on  
11 the precise -- precise grounds that you objected on or you  
12 raised the question for a motion in limine. I sustain your  
13 motion in limine.

14 MR. GILLAM: We understand, Your Honor.

15 THE COURT: All right. You do? Would you call me up  
16 this afternoon and tell me what I ruled?

17 MR. GILLAM: We understand the basis of the Court's  
18 ruling, and we can make a decision as to whether or not to  
19 bring him and see if we can lay some predicate. But given what  
20 the Court says, we'll be able to deal with it.

21 THE COURT: Let me say, for the benefit of the Fifth  
22 Circuit, that I know both of these local attorneys at least and  
23 I've had all the attorneys in before. Sometimes the record  
24 might come across as I'm treating these people like -- that I'm  
25 being curt with them, and inviting you to call me to have ex

1 parte comments and things like that, those are jokes. And it's  
2 my poor attempt to lighten up what is a very difficult and hard  
3 job, and so the only thing I require is that the attorneys  
4 laugh at them when I -- that's the only thing I require.

5 All right. With that bit of a note, we're through with  
6 that.

7 Now, did you have some other matters that you now felt  
8 like you wanted to -- do we have some logistical matters,  
9 such as introduction of what you -- stating your agreement  
10 on the record or what -- any other agreements or anything  
11 like that that you need to do? Or do I need to step down  
12 after having made these rulings?

13 MR. GILLAM: Your Honor -- somebody stop me if I'm  
14 wrong. I believe that based upon the Court's rulings, we  
15 should be able to reach -- or we have an agreement and will be  
16 able to present to the Court an exhibit list which has  
17 everything on it that the Court is letting in and keeping out  
18 everything that the Court has not permitted. I think we can do  
19 that. I think we've reached the agreements. We would like to  
20 put it in writing and get it to the Court.

21 THE COURT: All right. Fair enough. Is that your  
22 agreement too?

23 MR. FINDLAY: Yes, Your Honor, that's correct.

24 THE COURT: All right. Now, let me give you a few  
25 housekeeping matters and we can -- let's talk about these

1 things.

2 Your exhibits, of course, we've sent out a note, our  
3 typical order on having them numbered and so forth and in  
4 the proper order.

5 I don't really need copies of -- don't work yourself to  
6 death getting me a notebook. What we'll do is I've got  
7 these -- I have this screen here. If I need to do  
8 something, see something more specific, it won't take but a  
9 few seconds, I'm sure, for you to take it out of your  
10 notebook and hand it to me, all right?

11 And have we waived all our foundations for exhibits  
12 that are admissible or that you're agreeing on? Is that  
13 correct? Anything else? I'm assuming once you file your  
14 agreement, that they're admissible.

15 MR. GILLAM: Right. We have no foundational issues,  
16 Your Honor, that I'm aware of.

17 MR. FINDLAY: Right.

18 THE COURT: All right. Okay. Now, let's talk about  
19 your timing for trying the case. We'll be picking the jury on  
20 Wednesday. It's too late for me --

21 COURTROOM DEPUTY: Friday.

22 THE COURT: Friday, the 15th. It's too late for us  
23 to mail out jury questionnaires and have them back in time. I  
24 would -- I regret it, if any of you were planning on doing  
25 that, and it -- I will say this, if you have -- if you can come



1 up with a one page questionnaire that you agree upon, I can  
2 give it to them. And it will delay a little bit, but we'll  
3 have the jury fill that out.

4 The problem, as you can imagine, when we do that, as  
5 you all know, is collating them when we get them back over  
6 here. But we'll do that. We'll work through that if you  
7 can come through with one -- one page.

8 Do not ask them if they like or dislike the Judge. Do  
9 not put that question on there, all right? What about --  
10 you could ask them if they like lawyers, though. Again, I'm  
11 joking. I jest, because we all know the answer to those,  
12 don't we?

13 Well, anyway, so if you will work on that, an agreed  
14 questionnaire, and if you'll have it in to us, you know,  
15 maybe by Wednesday. What day is Wednesday? The 13th? We  
16 can take that and get it to the jury room and we'll take a  
17 few extra minutes to get that filled out. And, of course,  
18 our problem is we don't have any money to copy the -- make  
19 copies, so we have electronic -- if we can't do it  
20 electronically, you can't do it anymore. Okay. But I think  
21 we can spring for that.

22 Okay. Now, let's talk about our times here. Do you  
23 need more than three hours to try your case?

24 MR. FINDLAY: I think so, Your Honor, a little bit  
25 more than that.

1 THE COURT: You do? All right. Give me your best  
2 shot. I know you're going to ask for more than you're going to  
3 get, but, anyway, what do you -- let me tell you what I  
4 normally do on these things. I start out with ten hours and we  
5 can work on this. Give me -- give me your best shot on what  
6 you need.

7 MR. GILLAM: Your Honor, I think that we had  
8 estimated 13 to 15. I'm not sure how that broke down. We  
9 think we could do it in 13 per side.

10 THE COURT: 13 per side? All right. Done.

11 And I will not penalize or take away time from you if  
12 you can reach stipulations that do -- on those things that  
13 really aren't matters -- especially I encourage it on  
14 matters where you -- if you have witnesses that you feel  
15 like you want to -- you need their testimony but you don't  
16 need -- the jury doesn't need to see them or you don't feel  
17 like it hurts your case, if you want to stipulate to what  
18 their testimony would be, not that you agree with it, but,  
19 you know, those type stipulations, any type of stipulation  
20 you can that can help us move along.

21 Now, about your depositions, your video depositions,  
22 how are we looking on those as far as time goes and how  
23 much -- how much work do we need to do on those?

24 MR. FINDLAY: I think we might have to defer to our  
25 co-counsel here, Your Honor.

1 MR. CHENOWETH: Your Honor, Eric Chenoweth on behalf  
2 of the Plaintiffs.

3 There are likely two or three witnesses we would call  
4 by deposition. Our designated clips I think for those  
5 witnesses are only about 30 minutes each. I think the  
6 Defendants' corresponding clips for those witnesses are  
7 comparable time-wise. So maybe we will call two or three  
8 witnesses for a total of two to three hours of deposition  
9 testimony.

10 THE COURT: All right, sir.

11 MR. GILLAM: Your Honor, our best estimate is that  
12 it's about the same for us, probably two to three hours.  
13 Correct?

14 MR. SULLIVAN: Actually, ours may be a little longer.

15 MR. GILLAM: Ours may be a little longer than theirs  
16 as far as the clips, but we're looking at, if I'm correct,  
17 total, if they have two to three hours and we have three or so  
18 hours, then we may have a large -- bottom line is a lot of this  
19 case I think will be by deposition, by video deposition,  
20 because a lot of these folks were taken a long way away. But  
21 we will -- obviously understanding that our time comes out of  
22 the 13 hours obviously.

23 THE COURT: Okay. What I'm trying to get a handle on  
24 is any of these depositions that last for a long period of time  
25 and there's a particular segment in their interval. What's the

1 maximum you think you have on one?

2 Now, let me just back up here. I expect you to go  
3 through and have your people edit those things so that we  
4 don't have people waiting to show documents around and so  
5 forth. And I know that you always do -- both of these  
6 attorneys always seem to represent clients that have got  
7 them pretty well edited. But I do that actually in my  
8 attempt to help you with your presentation on these cases.  
9 As you all know, the juries just have a tough time with  
10 these cases.

11 MR. GILLAM: Your Honor, we are working together.  
12 The parties are working together to have a very well-edited  
13 deposition on each witness, and so it will be ready to go with  
14 respect to each one of them at the time. I mean, we're working  
15 together on that, Your Honor.

16 THE COURT: All right, sir. Now -- thank you. I  
17 appreciate that.

18 That goes to another subject here. As far as your  
19 opening for each witness, I encourage, not only allow but  
20 encourage you to take 30 to 45 seconds when you have a  
21 witness, especially if you want to place the context they're  
22 in, to make a statement about what the purpose is for this  
23 person's testimony. And I don't limit -- I don't charge you  
24 with -- I mean, that doesn't come out of your time for  
25 opening statements. It does, however, come -- it's total

1 time that you use here, but that shouldn't be much. So feel  
2 free to do that.

3 Let's see, what else do we have on our list here? All  
4 right. As far as choosing the jury, since we will have jury  
5 questionnaires, it really shouldn't take that long and I'll  
6 ask you -- I'll have a seven person jury. It shouldn't take  
7 long to pick the jury.

8 And I'll tell you this in advance, too. If you in  
9 advance agree to -- you've got three strikes. If you agree  
10 to pick to the end of the panel, in other words, you get  
11 more strikes if you can agree to do that, all right? We'll  
12 bring in 20 --

13 COURTROOM DEPUTY: One.

14 THE COURT: 21, so that leaves you some there if you  
15 reach an agreement. But you need to do it before we actually  
16 start the examination itself, okay, so that we're prepared to  
17 do that so that we know to go to the end of the panel when  
18 we're talking to them, okay?

19 MR. GILLAM: Understood.

20 MR. FINDLAY: Understood.

21 THE COURT: Now, for opening and -- or for voir dire,  
22 on those we usually go, what is it, three minutes? Oh, 20  
23 minutes. I make a statement.

24 And, by the way, anybody object to them watching the  
25 Judicial Council's film on patent cases?

1 MR. GILLAM: No, Your Honor.

2 MR. FINDLAY: No objection.

3 THE COURT: So my main thing is to just kind of tell  
4 them a little bit about it and set them at ease about being  
5 here and basically to get them ready for -- as best I can, to  
6 explain to them why a patent case might be a little bit  
7 different and the rules of the game about what they can and  
8 can't do.

9 What I'm saying is I give a pretty good period of time  
10 so that you can concentrate on asking specific questions to  
11 people, and I've found 20 minutes to be fine. You let me  
12 know. Can you live with that?

13 MR. GILLAM: Your Honor, I think so. The question I  
14 would have, in picking a jury before you before, the Court in  
15 the last jury I was involved with the Court on, you asked some  
16 questions yourself. We have the questionnaire and then you  
17 asked some questions yourself of the panel. Are you going to  
18 do that again?

19 THE COURT: I can do that, yeah.

20 MR. GILLAM: Well, it doesn't --

21 THE COURT: Whatever makes it easier. It's easier  
22 sometimes for us as far as going through the logistics of those  
23 things. What would you like for me to do?

24 MR. GILLAM: Well, the parties jointly -- well, I  
25 don't know about jointly. The parties did submit some

1 questions for you to ask.

2 THE COURT: All right.

3 MR. GILLAM: Which is fine with us. Now, if we're  
4 going to add a questionnaire to that, we'll look at the  
5 questionnaire in light of the questions that we submitted to  
6 the Court already and make sure there's no overlap there to the  
7 extent we can. But assuming that we have the questionnaires,  
8 assuming the Court asks some questions, 20 minutes a side, we  
9 think we can probably live with that.

10 THE COURT: All right. So to be clear on this, we  
11 will go ahead and have the questionnaire. You do want the  
12 additional questionnaire, or do you want me to submit the  
13 questions?

14 MR. GILLAM: We will submit an agreed questionnaire  
15 by Wednesday.

16 THE COURT: Okay. Good enough. You've got 20  
17 minutes, okay?

18 MR. FINDLAY: Thank you.

19 THE COURT: It's going to take you ten minutes to  
20 offset what I say though, right?

21 All right. What other things? Your opening and  
22 closing, I have no objection, as long as the parties agree  
23 to this in advance, on your opening statements to in effect  
24 kind of argue what your position is, if the parties agree to  
25 that. I will assume that you do agree unless I hear

1 otherwise, okay, that you have -- that you may -- you don't  
2 have to give a totally objective position.

3 MR. GILLAM: Understood.

4 THE COURT: Of what it is, but if one party  
5 disagrees, that's good enough for me. We'll just go back to  
6 the regular rules, okay?

7 MR. GILLAM: The Court is talking about the actual  
8 opening statements themselves, correct?

9 THE COURT: Right.

10 MR. GILLAM: Is it permissible, Your Honor -- I think  
11 we've done this before.

12 THE COURT: You cannot sit in the jury box with them,  
13 no, sir.

14 MR. GILLAM: Got it. In the voir dire itself, we can  
15 give not an opening statement obviously, but we can give them a  
16 little bit of context to what we're going to be asking  
17 questions about in the context of the case?

18 THE COURT: You can use your 20 minutes any way you  
19 want to use it.

20 MR. GILLAM: Thank you.

21 MR. FINDLAY: Thank you, Your Honor.

22 THE COURT: I have no -- that's your time that you  
23 use. Now, there are limitations, of course, but you know what  
24 I'm saying. You may go into those things.

25 MR. GILLAM: Your Honor, will we -- we'll pick the



1 jury on Friday. Will we do the opening statements on Monday?

2 THE COURT: I think we can -- that's a good question.  
3 We've got commitments all that next week. I -- I would like  
4 for you to make your opening statements on Monday -- I mean on  
5 Friday and we can just go from there, okay?

6 MR. GILLAM: If the -- assume we get the jury picked  
7 that morning, we can do -- well, the question would be if we  
8 get the opening statements out of the way Friday, will we begin  
9 the actual evidence on Friday as well or wait on that until  
10 Monday?

11 THE COURT: No, not unless everybody agrees. We're  
12 prepared to do it. If you agree to start on Friday, we'll do  
13 it.

14 MR. FINDLAY: I -- we'll talk about it, Your Honor,  
15 but I think --

16 THE COURT: That's no.

17 MR. FINDLAY: Based upon the preparations that we've  
18 already taken and communication with witnesses, I think we  
19 would prefer, if it's all right with Your Honor, to start the  
20 actual evidence on Monday.

21 THE COURT: No, that's the way I prefer it actually.  
22 It makes it easier for us, because we usually have a few loose  
23 ends, things that we didn't cover today that we need to talk  
24 about.

25 Okay. The Court -- it depends on how you're going.

1 We're going to start out on -- this will be the start of it  
2 anyway. We'll start out -- is it 7:30 or what is it? 8:30,  
3 8:00 for starting our trials here?

4 COURTROOM DEPUTY: We can start at 8:30.

5 THE COURT: All right. We'll start out at 8:30 and  
6 end at 5:30. Generally we have an hour and 15 minute sessions,  
7 which means that we'll break for 15 minutes after an hour and  
8 15 minutes, and for lunch we have an hour and 15 minutes.

9 Your opening and closing statements, 20 minutes. Any  
10 problems with that? Need more?

11 MR. GILLAM: We would like to have at least 30 on  
12 that, if we could, Your Honor, per side.

13 THE COURT: For opening?

14 MR. FINDLAY: Yes, Your Honor, we would join with  
15 that request for 30 minutes.

16 THE COURT: All right. How about closing?

17 MR. GILLAM: We're not sure about that yet, Your  
18 Honor.

19 THE COURT: All right. I'm going to go ahead --  
20 here's the thing. We need to be ready to jump right on into  
21 closing argument as soon as we read the jury charge. I mean,  
22 get the jury charge and go, so there won't be much break --  
23 there won't be really any break at all, because we'll be  
24 working on the jury charge all during the trial.

25 That doesn't mean that we don't have input as to what

1 goes in the jury charge. What I'm saying is we don't wait  
2 until the end of the evidence to do all our work. We'll  
3 work as we go, so that I expect to go right into it and we  
4 generally go 20 minutes. I'll give you 25 on it to -- for  
5 your closing arguments.

6 What else?

7 MR. FINDLAY: Your Honor, we did have one other  
8 question, if we might.

9 THE COURT: All right, sir.

10 MR. FINDLAY: Would it be possible -- and I'm not  
11 familiar or I don't recall the Court's procedure on this.  
12 Would it be possible for us to get the list of potential jurors  
13 before Friday, or is it Your Honor's practice to give them to  
14 us that Friday morning?

15 THE COURT: Ms. Pritchard, is that possible?

16 COURTROOM DEPUTY: We give them Friday morning.

17 MR. FINDLAY: Friday morning. Okay. Thank you.

18 THE COURT: All right. Anything else?

19 MR. FINDLAY: Not from the Plaintiff, Your Honor.  
20 Thank you very much.

21 THE COURT: Okay. Thank you. We'll go ahead and be  
22 here at -- usually my orders say that the actual selection,  
23 jury selection starts at ten a.m., but we'll need to be here  
24 earlier for us to have some discussions about what might have  
25 come up between this time and that time. What time? About

1 nine o'clock? Nine o'clock would be fine.

2 MR. GILLAM: That's fine with us. Could I have one  
3 moment, Your Honor?

4 THE COURT: Yes, sir.

5 One thing I'll also tell you about is that we have a  
6 seating chart for the parties, so you'll be able to -- and  
7 I'll go over this with you when you get here earlier, but  
8 basically we'll have jurors on both sides of the aisles out  
9 here and they'll be numbered and with their names, and it  
10 will have some basic information too that will be  
11 repetitious but it will be about the town in which they  
12 receive their mail, things like their employment, their --  
13 if they have a spouse, their spouse's employment, just very  
14 basic information that will be a supplement or be in  
15 addition to whatever else you have.

16 Now, it goes without saying that one thing that I  
17 insist on is that we be on time and that we -- we don't  
18 overlap our breaks and we do not have any unnecessary  
19 conferences at the bench. Those we can take care of either  
20 early in the morning, in the afternoon or at lunch. But I  
21 want to avoid interrupting. However, there are cases. You  
22 can't guarantee it won't happen, but we try to avoid those  
23 things.

24 There was one other thing too I wanted to say in that  
25 regard, but I can't -- it doesn't come to mind right this

1 minute.

2 MR. GILLAM: Your Honor, the last case that we had, I  
3 think it was the Court's preference that if there was a  
4 conference at the bench there would just be one attorney per  
5 side. I don't know if the Court follows that practice here.  
6 We did that in Marshall.

7 THE COURT: Yeah, that's my preference. You know,  
8 there may not be so many of us here that we can't do that, but  
9 let's go ahead and try that. Let's start out with one and then  
10 we'll go from there. If it's necessary to bring a compadre  
11 along to better explain something, I'm sure that's fine, okay?  
12 In other words, we don't need everybody up there. Just the  
13 people that are necessary, okay? Good point.

14 Okay. Anything else?

15 MR. FINDLAY: Not from the Plaintiff, Your Honor.  
16 Thank you.

17 MR. GILLAM: No, Your Honor.

18 THE COURT: Okay. Well, thank you and good luck on  
19 your case. I would say this, I would like to talk to the  
20 parties briefly, just an informal discussion back in my  
21 offices. Why don't you give me five minutes or so. I have to  
22 try to find my way back there. Anyway, no, just -- I would  
23 like to talk with you about a matter.

24 Anything else?

25 MR. GILLAM: No, Your Honor.

1 MR. FINDLAY: No, Your Honor.

2 THE COURT: Okay. Well, we'll look forward to seeing  
3 you at that time then. Thank you for your preparation.

4 MR. GILLAM: Thank you.

5 MR. ALLGEYER: Thank you, Your Honor.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21 I certify that the foregoing is a correct transcript from  
22 the record of proceedings in the above-entitled matter.

23

24

\_\_\_\_\_  
Jan Mason

\_\_\_\_\_  
Date

25